CHAPTER 6.0
OTHER ISSUES

6.1 OVERVIEW

As discussed in more detail above, in Mid States the court affirmed all of the transportation-related issues and most of the environmental issues that had been raised but remanded four environmental issues to the Board for further consideration. In response to the court's remand, SEA issued a Draft SEIS addressing the four remanded environmental issues for public review and comment. In doing so, SEA made it clear that only comments on the four remanded issues addressed in the Draft SEIS would be considered, as the record is closed on all other issues.

SEA received comments from 45 agencies, organizations, and citizens on its analysis in the Draft SEIS. These comments primarily addressed the four remanded issues—horn noise mitigation, noise and vibration synergies, air quality, and the Programmatic Agreement. SEA has responded to the major concerns raised in the comments on each of the four remanded issues in Chapters 2 through 5 of this Final SEIS. Each of the comments received, along with an individual response, also is included in Appendix A.

Four additional issues raised in the comments also warrant some discussion in this Final SEIS. These issues, discussed in the following sections, include the need to assess in this SEIS potential coal-train routings on the I&M Rail Link or IMRL rail lines (referred to as the I&M in the EIS) that DM&E acquired after issuance of the Board's 2002 Decision; SEA's environmental justice methodology; permitting and mitigation for wetlands; and concerns about the implementation of mitigation based on the number of trains rather than the level of annual coal transportation.

6.2 IMRL ROUTING

Olmsted County, Rochester, Mayo and several citizens commented that SEA should evaluate in the SEIS the potential impacts, including noise, of handling coal trains to and from the new DM&E line proposed in this project over the former IMRL rail lines. Commenters point out that, following the Board's 2002 Decision in this case, DM&E sought and obtained approval from the Board to acquire and operate the more than 1,000 miles of IMRL rail lines in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois.[1] Commenters argue that DM&E's acquisition of IMRL would give DM&E an alternative routing for the unit coal trains at issue in this proceeding. No longer would use of the existing IMRL line south from Owatonna, Minnesota be controlled by another railroad. Rather, that line would now be under the direct control of DM&E. Thus, DM&E's acquisition and operation of the IMRL lines, commenters believe, constitutes a changed circumstance for which SEA should now conduct additional environmental analysis.

In particular, commenters assert that because the IMRL system would provide DM&E access to the Chicago Gateway without the need to interchange with other railroads that route would provide the most logical routing for DM&E unit coal trains over the new line at issue here bound for Chicago and other more easterly markets. Commenters note that no large communities are located along this route (other than Chicago) and ask SEA to evaluate and compare the impacts of using the IMRL routing versus the impacts of routing unit coal trains along the existing rail line through Rochester, and to require DM&E to route trains over the IMRL line and not through Rochester if the IMRL routing is found to be environmentally preferable.

SEA sees no reason to undertake the analysis requested by the commenters. As an initial matter, the court in Mid States affirmed the Board's consideration of alternatives. Issues involving the routing of coal trains over the IMRL lines, either as an additional alternative route or as potential mitigation to reduce potential impacts of this project in

[1] STB Finance Docket No. 34177 – Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC (STB served, July 22, 2002 and February 3, 2003)(IMRL). Copies of the July 2002 and February 2003 decisions in IMRL are included in Appendix B.

Rochester, were not raised on judicial review of the 2002 Decision and are not related to the four issues remanded by the court. In any event, the commenters are wrong in viewing DM&E's acquisition of the IMRL lines as a changed circumstance that SEA must now evaluate. As discussed below, the Board made it clear in its decisions in IMRL that DM&E may not route unit coal trains associated with this project over IMRL lines until an appropriate environmental review has been conducted in the IMRL proceeding. Thus, it is not yet definite that DM&E will ever be authorized to route the coal traffic at issue here over those lines. Accordingly, a further assessment of the IMRL lines in this SEIS, in light of the IMRL acquisition, plainly would be premature.

The commenters fail to recognize that, in its July 2002 decision in IMRL, the Board imposed a condition specifically precluding DM&E from handling any coal traffic to or from the new line at issue in this case over the lines of the former IMRL until an appropriate environmental review has been conducted in that proceeding.[2] The Board explained that the new environmental inquiry would be initiated when DM&E notifies the Board that it has begun construction of the new line (assuming it is again authorized),[3] and DM&E provides the Board with the additional, necessary traffic and environmental information to allow for a meaningful environmental review.

In its decision in IMRL, the Board found that deferring the environmental examination of the potential environmental effects of moving PRB Expansion Project coal traffic over IMRL lines was appropriate, given the current uncertainty as to whether the PRB Expansion Project will again be approved and built,[4] and, if built, what portion, if any, of the traffic from and to that new line would move over the IMRL lines. The Board further explained that the information it would need to assess the potential impacts of handling this coal traffic on the IMRL lines was not yet available, noting that DM&E has not yet obtained any specific contracts to handle PRB coal, so that the ultimate destination of DM&E's

[2] IMRL, July 2002 decision at pages 13 to 19. See also February 2003 decision at pages 20 to 21.
[3] IMRL, July 2002 decision at page 19. See also February 2003 decision at page 21.
[4] Rail construction authority is permissive. Thus, DM&E could decide not to go forward with this project even if it is again approved by the Board. Furthermore, before DM&E could construct this line, it would have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies.

potential PRB coal traffic was not known, and that the numbers of PRB coal trains that would interchange at any particular point was therefore unavailable. Accordingly, the Board determined that it would have been premature to attempt to conduct such an assessment, in the proceeding approving the IMRL acquisition, or to supplement the already complete environmental review process on alternative routes in this proceeding until more information was available.

The traffic restriction imposed by the Board in IMRL continues to preclude DM&E from routing over IMRL lines coal traffic to and from the new line at issue in this proceeding until an appropriate environmental review is completed. Moreover, it is not yet definite that additional traffic to and from the proposed PRB Expansion Project line would move over the IMRL lines, or if there is such additional traffic, how much would be handled on the IMRL lines. And the necessary information to properly assess this is still unknowable at this point because DM&E has not been finally authorized to construct the new line and as of yet has no specific contracts to handle PRB coal. Accordingly, there is no changed circumstance warranting additional environmental review of alternatives, including the IMRL lines, beyond that already provided in the EIS.

Should DM&E be in a position to handle unit coal trains to and from the line at issue in this proceeding over the IMRL lines, the Board will complete an appropriate environmental review, considering the environmental implications of such routings before any such operations could take place.[5]

[5] As SEA noted in the EIS (Draft EIS, Chapter 1, page 29), DM&E has the ability to interchange PRB unit coal trains with other carriers at a number of locations along its system. To the extent the Board would ultimately grant DM&E the authority to route unit coal trains over the IMRL rail lines, the number of unit coal trains passing through Rochester would be lessened, reducing the environmental impacts of the proposed project on Rochester and thereby benefiting that City.

6.3 ENVIRONMENTAL JUSTICE

As part of the Draft EIS, SEA conducted an extensive evaluation of the potential adverse impacts to environmental justice (minority or low income) communities. SEA identified a number of environmental justice communities along the existing rail line.[6] SEA received a number of comments on the environmental justice methodology used in the Draft EIS. SEA therefore consulted with EPA and, using methodology approved by EPA, with whom SEA had consulted extensively throughout the EIS process, performed additional environmental justice analysis and identified additional environmental justice communities.[7]

On judicial review in Mid States, Olmsted County challenged SEA's environmental justice analysis methodology. Its concerns primarily centered on SEA's use of:

- 1990 Census data rather than more recent 2000 Census data (not yet available at the time of the EIS),
- Census block group data rather than Census block data, and
- comparison of low income and minority population data to statewide averages for these populations rather than county or other smaller geographic area data.

In Mid States, the court specifically upheld SEA's methodology, and it is no longer at issue in this proceeding.[8]

In its comments on the Draft SEIS, however, Olmsted County seeks to relitigate the same issues concerning SEA's environmental justice methodology by intertwining the environmental justice issues with the horn noise issue—which is one of the issues

[6] Draft EIS, Chapter 3, pages 3.1-122 to 3.1-123, 3.2-116 to 3.2-117, 3.3-86 to 3.3-87, 3.4-34 to 3.4-35, Chapter 4, pages 4.1-110 to 4.1-111, 4.2-52 to 4.2-53, 4.3-115 to 4.3-116, 4.4-145, 4.5-29, 4.6-40, 4.7-15, 4.8-14, and 4.9-46 to 4.9-47.

[7] Final EIS, Chapter 3, pages 3-77 to 3-82; Chapter 4, pages 4-13 to 4-18; Chapter 5, pages 5-62 to 5-64; Chapter 6, pages 6-17 to 6-19; Chapter 7, pages7-64 to 7-66; and Chapter 9, pages 9-78 to 81.

[8] 345 F. 3d at 541.

remanded by the court. Specifically, Olmsted County contends that circumstances have changed dramatically since the 1990 Census data was collected and that, over the last 15 years, Rochester's population, including low income and minority persons, has increased significantly. Therefore, it claims that SEA, as part of its further analysis of the horn noise issue, should re-evaluate, using the method formerly proposed by Olmsted County, the potential implications of the project on environmental justice communities. Such an analysis is necessary, Olmsted County seems to contend, in order for SEA to properly assess the potential horn noise impacts of the project on low income and minority communities. According to Olmsted County, these impacts include the increase in horn noise itself and the decline in property values, which, Olmsted County contends, would be more significant to low income and minority residents. Olmsted County further argues that when considering the potential costs of horn noise mitigation—one of the reasons cited by SEA in the Draft SEIS for not recommending additional horn noise mitigation—SEA must weigh the cost of the horn noise from this project to environmental justice communities.

For this SEIS, SEA has conducted extensive additional analysis to address the horn noise issue, as presented in Chapter 2 of both the Draft SEIS and this Final SEIS. But Olmsted County cannot successfully use the horn noise issue to re-argue its position that SEA's environmental justice methodology in the EIS was flawed because SEA's methodology and environmental justice evaluation were specifically upheld by the court. Therefore, SEA is not revisiting its environmental justice methodology or analysis in conducting its additional environmental review of whether specific horn noise mitigation is warranted. SEA thanks Olmsted County for its comments and has reviewed and carefully considered Olmsted County's contentions but concludes that no additional environmental justice analysis is necessary or appropriate in this case, and that the relevant horn noise issues have been thoroughly and appropriately addressed in the SEIS.

6.4 WETLANDS

SEA determined in the EIS that the proposed project, including the construction of the proposed rail line extension, sidings necessary for project operation, and rehabilitation of DM&E's existing rail line, could have significant impacts to wetlands. Because of these potential impacts and the permitting requirements of the U.S. Army, Corps of Engineers (COE) under Section 404 of the Clean Water Act, pertaining to wetlands such as these, COE (including both the Omaha and St. Paul Districts) became a cooperating agency for the environmental review process for the proposed project. As part of the EIS, SEA, in cooperation with COE, conducted an extensive evaluation of the potential impacts of the proposed project on wetlands associated both with the proposed new rail line construction and the planned rehabilitation of DM&E's existing rail line. The Board also imposed in the 2002 Decision, a condition (Number 59) specifically providing:

> Applicant shall obtain all Federal permits, including the Clean Water Act Section 404 and Rivers and Harbors Act of 1899 Section 10 permits, required by the U.S. Army Corps of Engineers, for project-related alteration or encroachment of wetlands, ponds, lakes, streams, or rivers, including the Missouri River, prior to initiation of any project-related construction and reconstruction.

EPA submitted comments on the Draft SEIS attaching comments it had previously submitted during the EIS process. EPA indicated that it did not believe that its previous comments had been adequately addressed and asked SEA to address these comments in the Final SEIS.[9]

SEA has carefully reviewed all of EPA's comments in this case, including its comments on wetlands, as EPA has requested. Those comments generally discuss information that EPA believes should have been provided as part of SEA's environmental review process. This information includes but is not limited to:

[9] In addition to its comments on wetlands, EPA included brief comments on air quality and impaired waters. SEA's responses to these comments are included in Appendix A.

- Wetland mitigation sites,
- Wetland mitigation plans, and
- Suitable ratios for wetland mitigation.

SEA is confident that potential impacts to wetlands will be appropriately disclosed, assessed and mitigated as part of implementation of this project, should the Board again authorize it. As previously indicated, the mitigation imposed by the Board in the 2002 Decision requires DM&E to obtain a Section 404 permit from COE prior to initiating project-related construction activities that affect wetlands. Moreover, SEA has consulted with both the Omaha and St. Paul COE Districts, the offices that would be responsible for issuing DM&E the Section 404 permits. Both offices have informed SEA that, after DM&E submitted applications for Section 404 permits to both Districts in September 2000, those applications were determined to be incomplete, and COE requested additional information from DM&E, including information on the identification of wetlands, mitigation sites, and wetland mitigation plans. Therefore, there is every reason to believe that the additional information on wetlands that EPA believes is needed will be developed as part of the Section 404 permitting process, should this project again be approved by the Board.

Given COE's knowledge and expertise on issues related to wetlands, SEA believes that requiring DM&E to prepare the information on wetlands that EPA believes is necessary as part of the required Section 404 permitting process is a reasonable and appropriate way to proceed. The Board's condition requiring that DM&E obtain a Section 404 permit assures that wetland resources impacted by the proposed project would be adequately identified, protected and mitigated in accordance with Section 404 before any project-related construction and rehabilitation activities that would affect wetlands could take place. Moreover, EPA would itself be a participant in the Section 404 permitting process and therefore would be in a position to assure that its concerns related to wetland and wetland mitigation are appropriately addressed. In fact, COE recently indicated to SEA that it has initiated coordination activities with EPA, U.S. Fish

and Wildlife Service, Wyoming Game and Fish Department, South Dakota Department of Game, Fish & Parks, and other interested agencies regarding the development of mitigation strategies for protection and mitigation of aquatic resources, including wetlands, related to this project.[10] COE further indicated that such coordination would continue throughout the Section 404 permitting process, assuring that all interested agencies, including EPA, have the opportunity to present their views and raise any concerns.

6.5 IMPLEMENTATION OF MITIGATION

In the EIS and the Board's 2002 Decision, several mitigation conditions (including Conditions 1, 95, 121, 123, 129, 138, and 144) were linked to particular levels of annual coal transportation. MNDOT, Olmsted County, and Rochester each submitted comments on the Draft SEIS requesting that SEA should recommend that the Board make its mitigation contingent upon the actual number of trains, not the amount of coal transported through the relevant community. These comments appear to be based on concerns that DM&E could route only empty coal trains through Rochester, finding alternative routes for loaded trains. Were that to occur, commenters are concerned that DM&E could contend that, even though the number of trains would reach or exceed the number at which mitigation should be required, it had not met the requirement of hauling the required amount of coal, and therefore could avoid being responsible for the mitigation.

Throughout the EIS process, SEA has linked DM&E's projections for annual coal transportation to a particular number of trains. As the EIS states, SEA considered the 20 million ton level equivalent to 11 DM&E trains per day, 50 million tons equivalent to 21 DM&E trains per day, and 100 million tons equivalent to 37 DM&E trains per day.

[10] Chandler Peter, U.S. Army, Corps of Engineers, Omaha District. Personal communication. October 2005.

SEA's understanding of DM&E's operations, should the proposed project be approved and constructed, is that loaded coal trains would travel eastward from the coal mines to coal-burning power plants for which DM&E has contracts to serve. Empty coal trains would travel westward from the power plants to the mines. While it is impossible for SEA to speculate on how DM&E would actually route its trains, because no contracts with specific power plants for coal delivery have been obtained, SEA anticipates that empty trains generally would return over the same route as loaded trains for the entire distance between the mine and user. All of SEA's analysis for the environmental review process is predicated on this operating scenario. Therefore, SEA sees no reason to recommend that the Board revise its mitigation conditions that are tied to certain levels of annual coal transport.

It also should be noted that if the proposed project is ultimately approved and constructed and DM&E's actual operations differ from what SEA has anticipated, interested parties could argue that a material change in the facts or circumstances has occurred and seek redress from the Board under condition Number 145 of the 2002 Decision. In that event, the Board would review the applicability of its final mitigation and impose additional or modified conditions, if warranted. For these reasons, SEA is not recommending that any mitigation conditions in the 2002 Decision should be revised so that they are linked to actual numbers of trains as opposed to levels of annual coal traffic.

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